Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-1094

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS, and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628-1114

Lawrence J. Ball
Boston, Mass.

Fred Goldstein
Plantation, Fla.

James F. Schoener, Wash. D.C.

Counsel for Plaintiffs-Appellants

QUESTIONS PRESENTED

1. Is the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes) overruled ?

2. Does a claimed First Amendment power in political parties to make private rules which can control primary ballot access for candidates and then incorporate the rules into state statutory schemes regulating ballot access conflict with the constitutional scheme for controlling political party or "faction" control of candidates through Art.I, Sec.4, the "Times, Places and Manner Clause," and Art.I, Sec.2, Cl.2, along with Art.I, Sec.3, Cl.3, the "Qualifications Clauses," as interpreted in Smiley, supra, and Powell v McCormack, 395 US 486, respectively. And is the holding below in conflict with this Court's decision in Terry v Adams, 345 US 461, as an attempt to evade the constitutional strictures of

one or both of those clauses by means of an unsanctioned pre-primary convention that excludes candidates from the ballot, or is Terry to be read more narrowly to encompass only attempts to evade the XVth Amendment ?

3. Does such an unsanctioned "jaybird" pre-primary convention of party insiders violate the "Equality Clause" of the XIVth Amendment by giving more weight to the votes of convention delegates than to the rest of the party members who vote at the ensuing official primary up to the point where, as here, one of two candidates may be eliminated from the ballot at the pre-primary convention to leave no choice at the primary ? Does it discriminate invidously against the candidate who lacks party-insider support and in favor of the candidate who does ? Does it make any difference that the rule establishing such a convention was voted on by only a small

number of party members and only a small number attend the convention or participate in the selection of delegates to it ?

4. Does it violate the rights of political association and expression under the First Amendment of all the members of a party who are not part of its inner group for a minority within the party to impose such a jaybird type of unsanctioned pre-primary convention upon "outsider" candidates and those who wish to vote for him ?

5. Does such a claimed constitutional right as that claimed here -- to have a jaybird type of unsanctioned pre-primary convention and use it to screen out candidates not popular with the delegates and to establish the convention by an authority to make rules and incorporate them into state statutes -- violate the system of checks and balances in the

Constitution aginst the intent of its framers ?

6. Is there any support for the claim of a First Amendment right to be able to incorporate private rules into state statutory schemes "as though" they were enacted by a legislature ? Once unilaterally "incorporated" by declaration into the state statutes, is the rule then merely a matter of state law, subject to interpretation by the state's highest court to which this and other federal courts must yield ?

7. Does a jaybird convention for statewide candidates violate the XVIIth Amendment ban on electors being required to have no requirements greater than those imposed upon the electors for the most populous house of the state legislature ? Does it meet the XVIIth requirement of being "by the people ?"

8. Should not the split in the

circuits between the 5th andthe lsts on unconstitutional election cases be resolved in favor of the rule of the 5th circuit that has proven to be the only effective way to stop those in power from abusing the basic right of franchise ?

9. Does the freedom of association give a party inner group a right to have the jaybird type of convention as an added requirement for ballot access ?

10. Was there not a preconceived plan here to hold an unconstitutional election barring ballot access to a qualified candidate and depriving voters of their right to have an effective vote, a remedy for which was timely sought, so that the primary election in 1982 should be voided and a special re-run election held ?

HEADING PAGE

QUESTIONS PRESENTED.....qp-1

TABLE OF CONTENTS.....tc-1

TABLE OF AUTHORITIES.....ta-1

REPORTED OPINIONS BELOW.....1

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR THE JURISDICTION.....1

A. THE NATURE OF THE PROCEEDING.....1

B. STATUTORY BASIS FOR THE JURISDICTION.....6

(ii) DATES BELOW.....7

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT.....8

CONSTITUTIONAL PROVISIONS, STATUTES THAT THE CASE INVOLVES....21

STATEMENT OF THE CASE.....21

ARGUMENT.....39

THE LOWER COURTS SEEK SILENTLY TO OVERTHROW THE HOLDING OF THIS COURT IN SMILEY.....39

AN ADDITIONAL BURDEN UPON BALLOT ACCESS IS EITHER A TIMES, PLACES AND MANNER OR A QUALIFICATION. IF THE PARTY RULE IS THE FIRST, IT FAILS THE SMILEY TEST, IF

THE SECOND IT CONFLICTS WITH THE HOLDING OF THIS COURT IN POWELL. EITHER WAY THERE IS A CONFLICT WITH TERRY V ADAMS....43

VIOLATION OF THE EQUALITY CLAUSE.....45

VIOLATIONS OF THE APPELLANTS' RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION UNDER THE FIRST AMENDMENT.....50

THE 15 PERCENT RULE IS AN ATTEMPT TO INSERT POLITICAL PARTIES INTO THE CONSTITUTIONAL FRAMEWORK AGAINST THE INTENT OF THE FRAMERS AND BYPASS THE SYSTEM OF CHECKS AND BALANCES: AS SUCH IT PRESENTS AN IMPORTANT AREA WHERE THIS COURT HAS NOT DEVELOPED PRECEDENT THOUGH IT CLEARLY NEEDS TO.....54

THE RULE IS NOT A STATE STATUTE INTERPRETED BY A STATE COURT; IT IS CLAIMED PURSUANT TO A FEDERAL RIGHT AS FEDERAL LAW BINDING UPON FEDERAL ELECTIONS. THE REPRESENTATION THAT IT IS MERELY STATE LAW IS ERROR THAT IS TOO DANGEROUS TO BE ALLOWED TO STAND.....58

THE SEVENTEENTH AMENDMENT.....61

5TH CIRCUIT CASES SHOULD APPLY, NOT 1ST.....62

REASONS WHY QUESTIONS PRESENTED

ARE SO SUBSTANTIAL AND REQUIRE
FULL CONSIDERATION.....63

SIGNATURE LINE AND SERVICE CERTIFICATE

TABLE OF AUTHORITIES

CASES PAGE

Abie State Bank v Bryan, 282 US 765.....59

Adamo Wrecking v U.S., 434 US 275.....61

American Party of Texas v White, 415 US 781 (1974)...48

Anderson v Celebrezze, 460 US 780 (1983).....49

Bates v City of Little Rock, 361 US 516.....53

Bell v Southwell, 376 F2d (1967).....2,62

Bread Political Action Comm. v FEC, 455 US 577.....60

Brown v Post, 279F.Supp.60(E.D.La.)....3,63

Caminetti v US, 242 US 470.....60

Carrington v Rash, 380 US 89.....49,

Cousins v Wigoda, 419 US 477 (1975).....33

Dawson Chemical Co. v Rohm & Haas Co., 448 US 176.....60

Consumer Product Safety Comm. v GTE Sylvania, Inc. 447 US 102.....61

Democratic Party of
the U.S. v Wisconsin,
450 US 107 (1981).....17,30,31
33

Griffin v Burns,
579 F2d 1065.....63

Hamer v Campbell,
358 F2d 215(1966).....2,62

Harper v Virginia
Board of Elections,
383 US 663, 667.....49,50

Irvine v California,
347 US 128 (1954).....59

Harrison v NAACP,
360 US 167.....53

Langone v Connolly,
446 N.E.2d 43, app. dism'd
cert den. 103 SCt 1510.....38,39

Lavine v Milne,
424 US 585.....57

Louisiana v NAACP,
366 US 293.....53

Lubin v Panish,
414 US 709.....46

Malone v White Motor
Corp. 435 US 497.....10,11,15

Marchioro v Chaney,
442 US 191.....15,29,46

Mullaney v Wilbur,
421 US 684 (1975).....59,16

NAACP v Alabama,
357 US 449.....52,59

NAACP v Button,
371 US 415.....52

Patterson v New York,
432 US 197.....59

Powell v McCormack,
395 US 486,.....qp-1,44,64

Radio Station WOW, Inc.
v Johnson, 326 US 120....16

Retail Clerks v
Schermerhorn
375 US 96.....11

School Committee
of Springfield v Board
of Education,
362 Mass. 417 (1972).....19

Smiley v Holm,
285 US 355 (1932).....qp-1,39,40,41
43,46,55,63,
64

Smith v Allwright,
321 US 649, (1944).....46

Storer v Brown,
415 US 724 (1974).....46

Sweezy v New Hampshire
354 US 234.....51

Terry v Adams,
345 US 461.....qp-1,43,45

Tsongas v Secretary

of the Commonwealth,
362 Mass.708,713 (1972).....19

U.S. v Gradwell,
243 US 476.....56

Ward v County Commissioners
253 US 17.....59

Wesberry v Sanders,
376 US 1.....51

Williams v Rhodes,
393 US 23 (1968).....49,62

CONSTITUTIONAL PROVISIONS	PAGES
Art.I,Sec.2,Cl.2 Art.I,Sec.3,Cl.3, The Qualifications Clauses.....	qp-1,7,21 44,64
Art.I,Sec.4,Cl.1, Times,Places and Manners Clause.....	qp-1,3,6 21,40,41 42,44,46 48,55,64
First Amendment.....	qp-1,qp-3, qp-4,qp-5 4,7,20,21 33,34,42 46,64
XIVth Amendment.....	qp-2,4,7 21,46
XVth Amendment.....	qp-2,45

XVIIth Amendment.....qp-4,4,7
21,61

STATUTES PAGES

2 U.S.C. 431 et seq.....6

28 U.S.C. 1652.....7,15,17

42 U.S.C. 1983.....2

Mass. Gen. Laws
Ann. (Lawyers' Co-op
Auth. Ed.)

Ch.'s 3-5,281.....40

Ch. 4.....19

Ch. 53 Sec. 2.....7

Sec. 34.....7

Sec. 41.....7

Sec. 44.....7

(former)Sec. 54.....7,8

(former)Sec. 54C.....7,8

(former)Sec. 54D.....7,8

Ch. 54 Sec. 41.....7

1973 Mass. Acts c. 429.....7,8,9,10
12,13,14

OTHER PAGES

Understanding the
Constitution, Corwin

and Peltason.....58

Elliot's Debates, Journal of The Federal Convention.....58

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN, ET AL.
Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

REPORTED OPINIONS BELOW

746 F2d 97, (1st Cir. 1984); remand 105 SCt 2106; 769 F2d 24

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR JURISDICTION

(A) The Nature of the Proceeding

This case comes back up after unanimous acceptance of cert, vacation and remand. Suit was brought by appellant Hopfmann as a Democratic Party candidate, and by four Democratic voters who wished to vote for him as a candidate unburdened by lack of

primary ballot access. They sued for that access in accordance with a state statutory scheme as prescribed by the legislature and for a declaration that it is a violation of the Constitution for the Secretary of State, appellee Connolly, to forbid access to Hopfmann by treating a Democratic party rule as though it were a law. They sued for damages for civil and constitutional rights violations pursuant to 42 U.S.C. 1983. After the court failed to get to the merits by the September 14, 1982, primary, appellants sought to void the primary which was held with Hopfmann excluded from the ballot and his opponent, Edward M. Kennedy, as the only candidate named (To avoid voter "confusion.")

Appellants seek this last under the 5th Circuit line of unconstitutional election cases in the South commencing with Hamer v Campbell, 358 F2d 215 (1966), and including Bell v Southwell,

376 F2d 659 (1967), the case most directly on all fours with the present one, as well as Brown v Post, 279 F.Supp. 60 (E.D. La.). Appellants contend there should not be a double standard of justice and that the same standard that was applied in the South should apply in Massachusetts.

Appellees argue an inherent right in political parties to make a private rule governing primary ballot access which can then be "added to" a state statutory scheme by the party's unilateral declaration through its inner, rulemaking, group and thereby become law just like statutes passed by the legislature in the normal course of its lawmaking which, when they concern the Times, Places and Manner of electing United States senators or members of Congress pursuant to Art.I, Sec.4, Cl.1., are coincidentally delegated federal law. They argue that this right to make such laws privately and then to

superadd them to those which the legislature has duly passed emanates from the First Amendment to the Constitution of the United States as part of the freedom of association as developed by this Court. Appellants argue that this contention is incompatible with specific language of the Constitution about senatorial elections and qualifications and with the broader concepts of the First and Fourteenth Amendment as they apply to appellants as well as with the Seventeenth Amendment.

Appellees argue that this "right" of private lawmaking has been delegated by the legislature to the inner political party group which exercised it, though they can point to no actual prescription of the legislature which expressly or impliedly makes such a delegation and even though the legislature has rebuffed the rule in question and the extra burden it places upon candidates in every way.

What the private rule in question requires of the candidate is that he or she attend a pre-primary convention of a small group of the party and obtain a certain percentage of the delegate votes there (15 percent) before the candidate may be placed on the ballot. This is an additional burden to the requirements for ballot access placed upon candidates in the state statutory scheme as written, where the principal requirement is the collection and certification of signatures of registered voters (10,000 for a candidate for a party's senatorial nomination.) Appellees argue that the imposition of this extra burden upon candidates is necessary and beneficial to the party even though the party's rank-and-file, in a sample, rejected the idea and have never since been allowed any say in the matter. Appellants argue that such unsanctioned conventions are an attempt to

avoid constitutional safeguards in order to disenfranchise (as it did here) or dilute the franchise of a majority of the party's ordinary membership and are, therefore, unconstitutional.

(B) The Statutory Basis for the Federal Jurisdiction

U.S. Senate races are regulated, in the first instance and in most respects, by the prescription of each legislature, except as Congress shall from time to time regulate by overriding law. This is set in Art.I, Sec.4, Cl.1 of the Constitution, known as the Times, Places and Manner Clause. (As an example of Congress' regulation by override, the start of these races is now defined by overriding federal law as set out in the Federal Election Campaign Act, 2 U.S.C. 431 et seq.). Since this authority is delegated to the state legislatures in the first instance by the Constitution, it is delegated

federal authority prescribed in state law and the state statutes embodying it, uniquely in the federal system, are coincidentally state and federal law. All statutes cited from the General Laws of Massachusetts are both federal and state law to the extent that they regulate federal races for the House and Senate. Secs. 2, 34, 41 and 44 of Ch. 53 and of Ch. 54, Sec. 41, of former Secs. 54, 54C and 54D of Ch. 53, and Mass. Acts 1973 c. 429, that repealed these last sections. Indeed, the 15% rule would be federal law if the appellees were right.

Also at issue are Art.I, Sec.3, Cl.3, the First, XIVth and XVIIth Amendments, 42 U.S.C. 1983, and 28 U.S.C. 1652, which compels federal courts to recognize state statutory schemes under independent state interpretation but not as distorted by novel extensions of federal rights.

(ii) DATES BELOW

Date of order and judgment below: July 31, 1985. Rehearing den. Sept. 23, 1985; Notice of Appeal filed Dec. 13, 1985.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT is 28 U.S.C. 1254 (2).

Sections 54, 54C and 54D of the Annotated General Laws of Massachusetts, previously, for a period of some years, provided for all political parties to hold pre-primary endorsing conventions. These conventions could endorse one candidate for each office but couldn't bar anyone from the ballot. They provided ballot access in an alternative way to the collection of signatures, not as an added burden on those who qualified by the signature method. By the statute 1973 Mass. Acts, c. 429, these sections were repealed. The pre-primary convention, even in this milder form, was eliminated from the state statutory scheme. It can't be

the case, logically, that this 1973 Act repealing pre-primary conventions is valid law and the 15 percent rule establishing a pre-primary convention with even stronger authority pursuant to First Amendment authority is also valid law. If one is valid the other has to be invalid and vice versa. Either pre-primary conventions are legal or they are not.

On remand from this Court's decision the First Circuit ordered the parties to make any arguments not previously made. Accordingly appellants, just in case the argument had not previously been fully developed, raised this point as follows: "In addition, in 1973 the Massachusetts Legislature repealed the power of a Convention to place a name on the primary ballot....Under the analysis of the proponents of the 15% rule, that statute is unconstitutional and both the statute and the rule cannot remain enforceable."

(Appellants' Brief on remand, page 14) Nonetheless, the first circuit again refused to face this issue and avoided saying that the '73 Act was invalidated by the rule being upheld "as though" it were law even though they cannot both stand.

We respectfully submit that this is an attempt to stop appellants from obtaining the appeal they're entitled to. Pre-emption exists and should be recognized. Malone v White Motor Corp., 435 US 497.

Under the theory of the appellees the party inner group that formulated the rule attaches it to the state statutory scheme by exercise of its First Amendment right, despite the will of the legislature that it not do so. There is no legislative history, therefore, of a legislature in the normal sense since legislatures, including the national Congress, are bypassed by such a newfound right in political parties and are not involved in

the actual formulation of the rule which allegedly then becomes part of their laws. Therefore, the legislative history is the history surrounding the formulation of the rule. Even though the rule is paramount federal law under this theory it has no legislative history we can research in the Congressional Record, Committee reports or transcripts of congressional committees. Since the party elite under this novel theory can replace the legislature, and, for that matter, the Congress, the purpose of the elite that formulated the rule is thus "the ultimate touchstone" under the test of Retail Clerks v Schermerhorn, 375 US 96, 103, as applied in Malone, where this Court said the federal courts:

> "normally sustain local regulation of the same subject matter unless it conflicts with or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy to the field to the exclusion of the States." Malone, at 504.

Under the theory of the appellants the rule and the 1973 act conflict under the above standard. To enforce the 1973 Act would clearly frustrate the "federal" scheme of the party vanguard to hold a pre-primary convention and force candidates to get 15 percent of the vote at it. It can clearly be discerned from the totality of circumstances that the party elite, in formulating the 15 percent rule, meant to occupy the field to the exclusion of the '73 statute. The history of the development of the 15 percent rule within the party inner convocations as set out in the record shows this. A 25 man Charter Commission produced documents and reports for the '79 Convention (App. N 1) which adopted the Charter containing the rule. Documents produced by the Charter Commission and circulated at the Charter Convention are in the record and are reproduced in the appendix. The one

entitled: "DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER," (App. M 1) by Jerome M. Mileur, Chairman of the Amherst Democratic Committee, associate professor of political science, University of Massachusetts, and member of the 25 man Charter Commission, said, p. M 2:

> "The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature....Many local Democrats attributed the deterioration of town and ward committees to the elimination of state conventions; and former House Speaker, David Bartley, at a recent state party gathering...called the vote to repeal the convention, taken during his tenure as Speaker, a 'mistake.'"

So the advocates of the rule intended to repeal the 1973 Act. Another document in the record below that circulated at the Charter Convention was an article from the Harvard campus publication Common Sense, "Unreforming the Parties," by Dobel and Stockton. (App. L 1) It is an unabashed paean to bossism and advocates a return to

smoke-filled room conventions and inside control. A single quote will epitomize and illustrate that it showed an intention to repeal or invalidate the Act that eliminates pre-primary conventions, (p. L 30): "First, all party decisions relating to policy and candidates should be made by conventions at which no more than one half of all delegates are chosen by primaries."

That this intention was transferred from the idea of enacting new legislation to undo the '73 repeal to the concept of First Amendment power in the party to restore the convention without legislative action was also in the legislative history of the rule at the '79 Charter Convention. Appellee Atkins, as the State Committee Chairman, circulated an "Important Notice" to all the delegates on the letterhead of the appellee State Committee which stated: "There is a distinct possibility...that a Party Charter will be held to supersede

state law." He referred to Marchioro v Chaney, 442 US 191,then pending.(Ap. N 10)

Further, if the assertions of the state court, the Supreme Judicial Court, (SJC), about there being a federal right to: (a) make party rules limiting ballot access with which state legislatures cannot interfere and (b) add them to the state statutes by unilateral declaration are examined independently, then it becomes evident that the language of the state statutory scheme for ballot access, as it has existed for over 80 years, is pre-empted under Malone also. The words of the statutes as they have stood for all these years, taken in their plain meaning, absent the extraneous factor of the newly discovered extension of the freedom of association, which is a federal right under the First Amendment, are exclusive.[1.2]

[1.2] n.1 and 2,p.17, and n.3.p.21. If part (b)above is ignored, no authority having been shown for it, then the language in which the legislature wrote the laws is a rule of decision which federal courts must follow by 28 USC 1652. The SJC is interpreting federal law not state law.

There is no independent non-federal ground for the SJC's re-interpretation of the language of the statutes regulating ballot access. The SJC opined that its interpretation was necessary to accomodate part (b) of the appellees' alleged right under the First Amendment. Yet no authority is shown to support such a second part to the freedom of association right claimed. In Democratic Party and Cousins, infra, state statutory language had to give way as invalid before a paramount federal freedom of association right. But there is not in those two cases authority to support the contention that the party may add its private rule to the statutory scheme by declaring the rule to be part of the state statutes, which is what the SJC opined. This is a subterfuge like that in Radio Station WOW,Inc.v Johnson, 326 US 120,129. See Mullaney v Wilbur, supra, at 691 n.11. The legislature made it clear in every way

available to it that it does not want the rule as a law. This is a private power to make public laws (App. F 13). Not in Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981) or any other decision of this Court, even wrenched out of context, (as the SJC did with the language of that case to justify part (a) of the freedom of association claim) are there words to justify this part (b) of the claim.

This part (b) of the SJC assertion should be ignored by federal courts as the subterfuge that it is. In complying with 28 USC 1652 they should read the state statutory scheme absent this distortion produced by the unsupportable claim of accomodation to private authority for the making of unwanted public laws.[1] When

[1] M.G.L.c.53, Sec.2: "candidates...shall be elected, in primaries or caucuses....no candidate shall be nominated...in any other manner than is provided in this chapter...."; Sec. 44: "The nomination of candidates for nomination at state

this is done it can be seen that either the 15 percent rule invalidates the state statutory scheme as clearly intended by the legislature or the private rule is not enforceable by public officials. Both cannot be law simultaneously. Upholding the rule means preempting the state statutory scheme as it has existed since 1894. Appellants therefore have the right of appeal under the rule of Malone. For if there is no right in private political parties to add rules to state statutory schemes, then the SJC went beyond its authority in reinterpreting the otherwise clear and exclusive language of the state statutory scheme to accomodate the claimed private lawmaking authority.[2] The SJC has

---

primaries shall be by nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters;" c.54, Sec.41: "Ballots for the use of voters in a voting precinct, polling place or town shall contain the names of all candidates duly nominated for

here sought to obfuscate by questionable semantics that which appellee Atkins

---

election therein,..."

[2]The SJC itself has held, when not bending statutory schemes to accomodate such dubious rights, that the statutes as written must be adhered to according to the plain meaning of the words used. Tsongas v Secretary of the Commonwealth, 362 Mass. 708, 713 (1972); School Committee of Springfield v Board of Education, 362 Mass. 417, 431-432 (1972). And this is dictated by a "plain meaning" statute which is particularly significant here: c. 4, Sec. 6: "Rules for Construing Statutes. In General.--In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute....How Words and Phrases Shall be Construed.--Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." So if the party inner group is a "law-making" body, then its intent is important, in which case the '73 statute is invalidated. If the party inner group is not a "law-making" body, then the intent of the legislature is determinative--and it clearly does not want the rule. Either way, mandatory appeal is in order. The same argument applies to "peculiar and appropriate meaning."

asserted as the intent of the rule in the quote above, that it should supersede state law. The lower courts have, without accurate analysis of their own, deferred to the SJC. A question whether a federal constitutional right invalidates state statutes is not for state courts to decide in a manner that is binding upon federal courts. Federal courts must consider the matter independently, which has not been done. If it were, either the statutory scheme would be invalidated, in the event the first part of the SJC First Amendment claim were upheld, or the first part of the First Amendment claim would be held to be unfounded and a nullity. Since the lower courts have upheld the claim in both parts but have only cited authority for the freedom of association claim (the first part) not for the private lawmaking authority (the second part) it can be seen that plaintiffs are entitled to appeal.

The statutory scheme has been pre-empted but the SJC has attempted to obfuscate this pre-emption. The lower courts have copied the SJC. This avoidance should not be allowed to obscure the pre-emption.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS THAT THE CASE INVOLVES

Art.I, Sec.3, Cl.3 and Sec.4, Cl.1; Amendments I,XIV, and XVII. 42 USC 1983, 28 USC 1652, and 2 USC 431. Mass. Gen. Laws Ann. (Lawyers Co-op Auth. Ed.) Chpts. 3,4,5,281; Chpt. 53 Secs. 2, 34, 41, 44, former secs. 54, 54C and 54D; Chpt. 54, Secs. 28, 41. 1973 Mass. Acts c. 429.

STATEMENT OF THE CASE

The legislature has enacted into law a state statutory scheme for the regulation of primary ballot access for candidates for party nominations for elective office. This statutory scheme relies exclusively[3]

---

[3] c. 53, Sec. 34: "Except where vacancies caused by death, withdrawal or physical

upon the collection of a specified number of signatures of registered voters to assure that candidates have a substantial measure of popular support before they may be on the ballot.[4] This is known as the "method of nomination papers" in the statutory scheme.[5] The voter signatures need not be of voters registered at the time of signing as members of the party whose nomination is sought.[6] They can be unenrolled voters but can't be enrolled in a party other than that whose nomination is sought, else the signature will not be certified.[7] At the time of the official statewide primary, held in September of even-numbered years, voters may only vote for the candidates of the party in which they enroll. They may affiliate with a

---

disability are filled, no names shall be printed on a ballot other than those presented on nomination papers."

[4] See n. 1, p. 17 above.

[5] id.

[6] id. See also c. 53, Sec. 7

party on the day of the primary if unenrolled. But to change from another party they must do so 28 days before.[8] Primaries are the only way that U.S. senate candidates can be nominated by a party.[9] Candidates must have been in the party whose nomination they seek for 90 days prior to the date of filing of the nomination papers, which, in this case, was the first Tuesday in June. They can't have been enrolled in another party for a year prior to that date.[10] Ten thousand signatures must be obtained by a candidate seeking the office of party nominee for U.S. senator or other statewide office and a lesser number for offices that represent less than the entire geographic extent of

---

[7] c. 53, Sec. 46.
[8] c. 53, Secs. 37,38; c. 51, Sec.44
[9] c. 53, Sec. 41: "Primaries shall be held for the nomination of candidates of political parties for all offices to be filled at a state election, except presidential elector."
[10] c. 53, Sec. 48, Sec. 10.

the state.[11]

This method of nomination papers has been the exclusive method of primary ballot access in the state statutory scheme for many, many years[12] and the exclusivity of its language had never been challenged up until the time of the present controversy. It is a carefully crafted scheme in which the legislature has chosen quite explicitly to allow great freedom to the unenrolled to join parties, but restricts party switching by those who stay enrolled in a party to participate in its activities constantly. Thus it can be said to be designed by the legislature to provide a core of more active loyalist members in each party who are bound to the party as voters and candidates but to

---

[11] See n. 1 above, p. 17.

[12] The Authorized Mass. Gen. Laws Ann. (Lawyers Co-op.) reveals that most of the sections cited began in 1894 and 1898, at the very beginning of the populist-progressive reform that led to the modern

allow the unenrolled voters to be attracted back and forth between the parties. The legislature did, for a period of time, enact into law an addition to this statutory scheme which provided for an alternative method of ballot access for a single party endorsee for each elective office. This was a statutory delegation of authority to parties to hold pre-primary endorsing conventions to name endorsees.[13] These endorsing conventions had no authority to exclude anyone from the ballot who qualified under the method of nomination papers. For 2/3 of their life they couldn't grant ballot access. In 1973 the legislature terminated this

---

primary.

[13] Former section 54 of c. 53 provided for a pre-primary convention that could endorse a single party endorsee for each office and it dated back to St.1932 c.310, but the endorsement did not become a nomination, and thus an alternative method of ballot access until 1953 when former Sec. 54C of c. 53 was enacted along with former section 54D.

experiment by an act which eliminated the sections that had delegated to parties the convention authority.[14]

Several years after the legislature ended the endorsing convention authority, certain leaders of the Democratic Party, though not joined, as it appears, by leaders of the Republican Party, evinced a desire to revive the pre-primary party convention as a device for naming a party endorsee for each office and to strengthen and expand the power of such pre-primary conventions to include authority to bar candidates from ballot access even if they qualified under the method of nomination papers.[15] They formed the 25-man Charter Commission, which held hearings, took evidence, surveyed the rank-and-file, and

---

[14] 1973 Mass. Acts. 429, AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES. Text in Appendix.

[15] For a cursory history of these events as it appeared in the agreed upon statement

then drafted and proposed a Party Charter containing a number of measures designed to "strengthen the party."[16] Prominent among them was the revival of the pre-primary convention with powers expanded to include not only the endorsement of an endorsee but also the limiting of ballot access. To limit access to the ballot, the rule required each candidate other than the endorsee to get 20 percent of the votes of the small number of delegates at

---

of facts below, see App. N 1.

[16] In one of the documents from the record below showing the "legislative history" of the 15 percent rule, one that is not reproduced in the appendix, a memo to the Charter Commission from Professor Mileur as Chairman of the Amherst Town Committee, it was stated: "Our mandate directs us to "consider" the question of conventions. Reestablishing Party influence over nominations means returning to something like the old pre-primary endorsement convention, but it is unlikely that we could ressurect it bodily even if we wanted to. Hearings conducted last Spring by the Committee on Party Structure of the State Committee found grassroot Democrats opposed to a return to the old convention system." This does not seem to have given the leadership pause.

the revived convention before being allowed on the ballot to challenge the endorsee at the official primary prescribed by the state statutory scheme.

In 1979 a small number of Democrats[17] held a Charter Convention which considered and adopted the Party Charter proposed by the Charter Commission including the provision for reviving the pre-primary convention and enlarging its powers to include controlling ballot access. The Charter Convention reduced the figure to 15 percent and the provision became known as the 15 Percent Rule. It was at this Charter Convention that appellee Atkins first publicly raised the contention, upon which appellees now principally rely, that a party might have a constitutional right to control ballot access by private

---

[17] About .08 percent of the number of enrolled Democrats. The number of delegates who ultimately passed the 15 percent rule at this Convention was about

rule.[18]

After this small group adopted the Party Charter proposed by the Commission, there was no effort to obtain the views of the full membership on the rule. In 1980 the leaders sought to get the rule enacted into law. The bill died in committee as it did again in 1981 along with six other such bills,[19] thus making 8 times that the rule was turned down by the legislature.

In 1981 also the party held its first

.06 of the enrolled membership.

[18] Atkins, as State Committee Chairman, circulated an "Important Notice" (App. N 10) saying that this Court might soon hold that a Party Charter could supersede state law. He referred to Marchioro v Chaney, 442 US 191, then pending. When the case was decided some weeks later the opinion did not support his hopes. To a great degree it went the other way, indicating that the electoral function is a state matter delegated to parties in limited circumstances by statute and subject to the Equality Clause of the XIVth Amendment and other such safeguards surrounding the concept of "one man-one vote."

[19] Sen. No.365 of 1980, Numbers 1980, p. 45S. In 1981, (Page is in official Numbers.) s 390, p. 27S; s 403, p. 28S; s 410, p. 28S; H 1792, p. 120H; H 3343, p.

Issues Convention pursuant to the new Party Charter, which provided for such conventions in odd-numbered, off-election years. At this April Convention, the small number of party members present[20] re-endorsed the concept of the 15 percent rule. Earlier, on February 25, this Court had decided The Democratic Party of the U.S. case, supra. Mr. Atkins did not revive his idea of a party right to unilaterally enforce the rule at the Issues Convention. Later, he agreed to

---

219H; H 3566, p. 234H; H 4544. p. 298H.

[20] According to figures agreed upon below there were some 3,250 delegates selected, in turn, in caucuses involving some 30,000 party members. It is agreed upon that the next year, in 1982, there were about 1.3 million registered Democrats. So these figures represent 1/4 of 1 % and less than 3 % of party membership, respectively. Of course, as appellees will be quick to point out, anyone could attend the caucuses who could get off work during the day in business hours, and voting was on the basis of one Democrat attending-one vote, provided you signed your delegate ballot so that the party leaders could see who you voted for under another party rule.

testify that it was at a November meeting of the State Committee in Northampton later in that same year that he first announced the idea publicly that the decision in Democratic Party could make the rule effective without legislation.

Early in the next year, a legislative ally of the rule's proponents introduced a bill to add to Section 44 of Chapter 53 new language that would make it clear that the method of nomination papers remained the method of ballot access despite any party rule.[21] It appeared to be an attempt to reject the rule and confirm the method of nomination papers.[22] It passed and went to the governor for signing. On April 6, the governor sent the Bill to the SJC for an Advisory Opinion under the state's constitutional provision for such

---

[21] House No. 5852, introduced by Mr. Serra of Boston.

[22] The text of the bill is in the advisory opinion, In re Opinion of the Justices,

non-precedential, non-law opinions. The governor asked two questions in sending the bill. First he asked if the bill was needed, asking if the state statutory scheme as it existed did not already make the method of nomination papers exclusive regardless of any claim by the party to be able to unilaterally enforce its rule to control ballot access. The second asked if the new bill were signed into law, would it not prevent the rule from being used ?

After 17 days, allowing 10 days for comment, the SJC rendered an advisory opinion. In it they refused to answer the first question because, they said, it would require them to comment upon the underlying state statutory scheme regulating ballot access as it existed prior to the passage of the bill, which, the court said, was forbidden under the advisory opinion procedure. As to the

second question, the court opined that it would interfere with the party's freedom of association under the First Amendment to the United States Constitution as it was explained by this Court in Democratic Party, and Cousins v Wigoda, 419 US 477 (1975) for the legislature to interfere with the operation of the party rule by statutory prescription. But the SJC went beyond just opining that the party had an inherent First Amendment right to regulate candidate selection as part of its internal affairs (like organizing the entertainment) under a somewhat overly stretched reading of certain language in these cases. -Citing no authority for the proposition, the SJC opined an even more novel theory, one theretofore unheard of in constitutional jurisprudence. The party, the SJC opined, had an absolute federal First Amendment right to "add to"

the existing state statutory scheme with its new rule, so that the rule became part of the existing state statutory scheme against the will of the legislature as clearly expressed in every possible way. The existing state statutory scheme, which clearly by its language made the method of nomination papers the sole method of, and requirement for, ballot access, the SJC opined, had to be reinterpreted in the light of this important newfound federal First Amendment right of freedom of association so as to allow this addition of a private rule by a means outside the normal method of lawmaking. Without actually analyzing the language of the statutes that were involved, or even discussing any actual ambiguity in language, the SJC opined that the existing state statutory scheme's language would have to be interpreted to have two

meanings in order to "accomodate" the First Amendment empowered right of the party to add to the statutory scheme by private rules.

On May 21, 1982, the party held its first pre-primary nominating convention under the new 15 percent rule, at which the delegates, 1/4 of 1 percent of the membership,[23] voted for the first time to accept the rule and put it into practice at a convention summoned pursuant to it. In adopting the rule at the convention, its proponents relied upon the SJC advisory opinion without bothering to explain that such opinions are not law. Appellant Hopfmann attended the convention under protest as to its constitutionality and that of the rule. He obtained the

---

supra.

[23] Again the convention delegates were elected in workday caucuses, this time involving up to 100,000, or 7.6 % of membership, and again the same national party rule requiring non-private ballots.

votes of 65, or 2% of the delegates. On May 25, Atkins, as the Chairman of the Democratic State Committee, transmitted by letter to Connolly, as the official in charge of ballot access, the names of the convention endorsees and those who had obtained 15 percent of the delegate vote and were, therefore, as Atkins saw it, eligible to challenge the endorsees.

In the case of the party's nomination for "senator in congress," as it is called in the statutory scheme, there were no candidates other than appellant Hopfmann and Edward M. Kennedy, the endorsee. So only Kennedy's name was transmitted by Atkins to Connolly as the endorsee for that office, with no names of challengers meeting the requirements of the rule. On the 28th appellant Hopfmann filed his 10,400 signatures with Secretary of State Connolly, who issued a receipt through his

subordinate but refused to place appellant Hopfmann's name on the ballot for the reason, as he publicly stated, that he had to abide by the advisory opinion of the SJC. Connolly did not publicly explain that advisory opinions are not law.

Connolly also barred other candidates, for the Democratic nomination for the state posts of governor and lt.-governor, from the ballot for the same reasons and issued a public statement about doing so though, curiously, it did not mention appellant Hopfmann and the race for the nomination for Edward Kennedy's incumbent seat. Within a few days appellee Connolly was notified by appellee Bellotti, as the state's highest legal officer, that what he was doing was illegal and unconstitutional, that the advisory opinion of the SJC was not law that he had to follow and that Connolly had no

discretion entrusted to him by the state's laws to bar individuals who had collected and certified their signatures from the ballot. Furthermore, appellee Bellotti informed appellee Connolly that he would not represent him in the matter.[24]

Nonetheless, Connolly persisted in refusing ballot access to appellant Hopfmann and the other candidates similarly situated, who were running for state rather than federal offices. On June 3, 1982, 5 days after being informed that Hopfmann would not be allowed on the ballot, appellants filed the present action in the United States district court in Boston and this litigation ensued.

---

was enforced.

[24] Bellotti subsequently intervened, as the Attorney General, in Langone v Connolly, 446 N.E.2d 43, on behalf of Langone as an excluded candidate for state office and against the rule, going all the way up to this Court, where the case missed by one vote, 103 SCt 1510, app'l dsm'd,cert den'd

ARGUMENT

THE LOWER COURTS SEEK SILENTLY TO OVERTHROW THE HOLDING OF THIS COURT IN SMILEY

Upon remand, the circuit court has again refused to face up to the conflict between the unanimous opinion of this Court in Smiley v Holm, supra, and the "right" of private lawmaking which the appellants claim. Upon remand the circuit court has incorporated from Langone v Secretary of the Commonwealth, 388 Mass. 185, 195; 446 N.E.2d 43, 48 (1983) the treatment of "the rule as though it were expressly contained in G.L. c. 53," the state statutory scheme governing election laws. (Supp. App. A-5) If the rule is expressly contained in the state's election laws then it must be an election law itself. How, then, does it comply with Smiley ?

Mr. Chief Justice Hughes' opinion in

Smiley made it clear that Art.I, Sec.4 unequivocally delegates federal authority to the legislature of each state, meaning legislatures as known at the time of the framing of the Constitution and as they are still known in this country today, not to any other part of the state government, and certainly not to the Secretary of State for enforcement of private party rules made by an inner elite as set out in the Statement of the Case. id., 365-367. Moreover, Mr. Chief Justice Hughes made it clear that it means the state legislature acting in discharge of its legislative, law-making function. loc. cit. "[T]he authority is conferred for the purpose of making laws for the State...the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments." Chapters 3 through 5 and 281 of the Mass. Gen. Laws Ann. (Lawyers Co-op Authorized

Edition) set out the method which Massachusetts has prescribed for legislative enactments. Nowhere in them is there anything resembling the authority to enact laws by private action of a political party group that the appellees and the lower courts advocate here.

By not even mentioning Smiley, and by referring to the questions raised by appellants' Art.I, Sec.4 contentions as having been answered by its earlier affirmance of the district court's dismissal of appellants' case, the circuit court made it clear that it would not face directly the overthrow of Smiley which its holding would accomplish if left standing. The district court which it thus silently affirms dealt with the Art.I, Sec.4 claims of appellants by stating that this Court had twice rejected them by single justice action, thus confusing rejection of preliminary extraordinary relief with

disposition on the merits.[25] This is scarcely a facing of the issue.

A similar tactic was adopted by the circuit court in its first decision. It based its rejection of appellants' Art.I, Sec.4 contentions on a "delegation" of power which it suddenly found in the party, a delegation the other side had never argued and one which seems to have a certain ethereal quality since its source and mode of transmission have never been explained or pointed out, though it clearly never came from the legislature by

---

[25](App. OB 41) This was preceded by the statement: "No substantive issue remains to be determined." It was followed in turn by the pronouncement: "There is no substantial federal question to be determined and the action is dismissed on its merits." This last, of course, is not so. U.S. senate races are federal matters from start to finish, regulated by exercise of delegated federal constitutional authority and, moreover, appellees' claim here rests ultimately, in its entirety, upon the right of freedom of association which they claim as emanating from the First Amendment to the Constitution of the United States.

a law, and certainly was not in any form that met the rule laid down in Smiley. Now it says the matter has already been disposed of. The fact is that it has not been. The central question remains: Is Smiley being eroded surreptitously by a decision which is in direct conflict with it here, though the courts are being careful not to articulate that conflict ? Jurisdiction should be noted to assure that this does not happen.

AN ADDITIONAL BURDEN UPON BALLOT ACCESS IS EITHER A TIMES, PLACES AND MANNER OR A QUALIFICATION. IF THE PARTY RULE IS THE FIRST, IT FAILS THE SMILEY TEST, IF THE SECOND IT CONFLICTS WITH THE HOLDING OF THIS COURT IN POWELL. EITHER WAY THERE IS A CONFLICT WITH TERRY V. ADAMS.

What is this pre-primary convention that the appellees have created against the expressed desires of their legislature and with no sanction from that body ? Constitutionally it must be either part of the Times, Places and Manner of electing a United States Senator, which must be

prescribed pursuant to Art.I, Sec.4, or it is a Qualification for being a Senator like those set out in Art.I, Sec.3, Cl.3. There is no third alternative for something which is claimed to be part of a state statutory scheme for ballot access. If it is the first, it falls afoul of Smiley and if it is the second it would be a similar attempt to overthrow the holding of this Court in Powell v McCormack, 395 US 486, that the qualifications expressed in the constitutional clause are exclusive and preemptive. Meeting the 15 percent rule's requirements is not set out in the Qualifications Clause itself. Only a constitutional amendment could make it such a qualification. An attempt to have a screening out convention by private authority before the official primary dictated by the state statutory scheme in order to avoid either or both of these constitutional mandates violates and is in

direct conflict with the holding of this Court in Terry v Adams, 345 US 461 (1952). Sanctioning such a scheme conflicts with this Court's holding in that case. For Terry stands for the proposition that any such convention held to restrict ballot access in a way that would otherwise be prohibited by constitutional strictures is illegal. The ruling of the case is not narrowly confined to the avoidance of constitutional strictures against racial discrimination under the XVth Amendment.

VIOLATION OF THE EQUALITY CLAUSE

A political party does not have a unilateral right to make rules limiting primary ballot access for its members seeking its nomination which go beyond the limitations upon ballot access that the legislature has set. A party can only place additional burdens upon ballot access where a legislature, acting in compliance with Smiley, has delegated such

authority, and then the exercise of the delegated authority is limited and subject to safeguards of the First and Fourteenth Amendments, in particular, the doctrine of one man-one vote. Marchioro v Chaney, 442 US 191 (1979). For the conduct of primary elections is a state function, not a private one. Marchioro, supra, Smith v Allwright, 321 US 649 (1944); Storer v Brown, 415 US 724 (1974); Lubin v Panish, 414 US 709 (1974). To upset this established doctrine by letting the lower court decision stand would be a conflict with prior decisions of this Court.

Once a legislature has prescribed Times, Places and Manner of electing, in accord with the mandate of Art.I, Sec.4, candidates are entitled to run in accordance with that prescription without additional features being privately added. And voters are entitled to vote for the candidate of their choice without that

candidate having burdens added that are in addition to those prescribed by the legislature. For a private political party, acting, as here, through a party elite that does not reflect the feelings of the party's full membership, to add an additional requirement is to create a class that is improperly discriminated against in those who do not meet the additional burden thus privately placed and also in those who wish to vote for that candidate so discriminated against without that additional burden. Indeed, all of the party's members who are not part of the inner group that formulates and enforces the rule at the convention are discriminated against by having their franchise diluted, or, as happened here, by being deprived of any choice at the ensuing primary. When, as here, an official or officials of state government, by virtue of the color and authority of

their office, enforce that discrimination as a law, violation of the right of equal protection of the laws guaranteed by the Fourteenth Amendment results. Such discrimination is inviduous per se because it is, by definition, discrimination by the powerful, i.e., political insiders against those whose only source of power, their vote at the primary, is diluted or, in this instance, taken away by the decision made at the convention. Though this Court has addressed the issue of discrimination by the state against minor political parties and independent candidates when the state acts in accordance with Art.I, Sec.4 through its legislature in cases such as Williams v Rhodes, 393 US 23 (1968), and American Party of Texas v White, 415 US 781 (1974), it has not fully addressed the question of insider discrimination against the party rank-and-file in this matter of ballot

access. Nonetheless, in Williams, Mr. Justice Douglas made it clear that: "To force a candidate to rely on write-ins is to burden him with disability. It makes it more difficult for him to get elected, and for the voters to elect him." id, at 37. In the situation of bars to ballot access, the two kinds of rights, of the candidate barred, and of the voters who might vote for the candidate on the ballot, are intertwined. Anderson v Celebrezze, 460 US 780 (1983). As Douglas pointed out in Williams, the Equal Protection Clause bans any "invidious" discrimination," in the electoral process. Harper v Virginia Board of Elections, 383 US 663, 667. id. at 39. The Clause "protects voting rights and political groups (Carrington v Rash, 380 US 89), as well as economic units, racial commmunities, and other entities. When 'fundamental rights and liberties' are at

issue (Harper v Virginia Board, supra, at 670), a State has less leeway in making classifications than when it deals with economic matters." id. at 39. To paraphrase, a State has precious little leeway in making it difficult or impossible for the ordinary members of the party to vote for and to organize campaigns for the candidates of their own choosing among those who have qualified under the state statutory scheme as enacted by the legislature which they elected. loc. cit. Jurisdiction should be noted in order to apply the Court's canon of equal protection cases to this area of the rights of ordinary party voters against insiders trying to dilute or take away their power.

VIOLATIONS OF THE APPELLANTS' RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION UNDER THE FIRST AMENDMENT

This then affects the appellants First Amendment rights, as made applicable to

the states by the Fourteenth. If the right to vote is thus undermined, the rights of expression and assembly which combine into the First Amendment freedom of political association will also be undermined. A trend toward party elitism will burgeon unchecked if there is not the right of the ordinary voters to raise up candidates from their ranks to defeat leaders who grow remote and unresponsive. Wesberry v Sanders, 376 US 1, 17. Dissident groups, within or without the party, have innumerable times been in the vanguard of democratic thought and have had their ideas ultimately accepted by the majority. The absence of dissident groups within the party, and the loss of the power of the rank-and-file to raise up a candidate against the conventional insider wisdom of the leadership would be a symptom of grave illness in our society. Sweezy v New Hampshire, 354 US 234, 250-

251. The freedom of association, as it applies to groups, protects the entire group or association; it does not enable one inner group to discriminate against others within the group. It is only applicable where the organization, in this case the state Democratic Party, is found to be "the appropriate party to assert these rights, because it and its members are in every practical sense identical." NAACP v Alabama, 357 US 449, 459. Its "aims and interests" must not be "shown to conflict with those of its members and nonmember[s of a similar class.]" NAACP v Button, 371 US 415, 443. In this case the inner group that propounded and enforces the rule has shown that its aims and interests are in controlling candidate selection through the convention. This conflicts directly with the interests of the ordinary members in participating in candidate selection at the primary under

the statutory scheme, and also at the expense of those who are not members at the time of the convention but who may subsequently join before the primary. Harrison v NAACP, 360 US 167, 177. What the organization claiming the right of freedom of association must assert is the "corresponding" right of every single member. NAACP v Button, 371 US 415, 429; Bates v City of Little Rock, 361 USS 516, 523: Louisiana ex rel. Gremillion v NAACP, 366 US 293, 296. A right which belongs to some members over against others is not a freedom of association right because it does not promote political expression and communication. It defeats expression when a minority within a party cuts off full expression of the franchise by the majority in a way that was not wanted by the legislature as necessary for an orderly ballot. The Court should note jurisdiction in order to establish the rights

of association and expression for ordinary voters and non-insider candidates within parties. It is vital to make more explicit the message of the NAACP line of cases that community of interest of all the members of an organization is necessary before it can assert the freedom of association right on behalf of its members. The right should not be used to justify "faction" and factionalism.

THE 15 PERCENT RULE IS AN ATTEMPT TO INSERT POLITICAL PARTIES INTO THE CONSTITUTIONAL FRAMEWORK AGAINST THE INTENT OF THE FRAMERS AND BYPASS THE SYSTEM OF CHECKS AND BALANCES: AS SUCH IT PRESENTS AN IMPORTANT AREA WHERE THIS COURT HAS NOT DEVELOPED PRECEDENT THOUGH IT CLEARLY NEEDS TO.

The establishment of private law-making authority by political parties would bypass the national and state legislatures in the matter of ballot access laws.[26] It

[26] It would be particularly harmful in the one party state where the primary becomes dominant. As the parties agreed below, no Republican has won statewide office in Massachusetts since 1972.

goes directly against the intent of the Framers of the Constitution and would erode the "checks and balances," including those of federalism, upon which our constitutional system is premised. As was pointed out in Smiley, the action of the legislatures in prescribing election laws under Art.I, Sec.4 is the same as that of Congress when it acts under that clause and prescribes election laws that override those of the states, as it did in the Federal Election Campaign Act, 2 U.S. C. 431 et seq. If parties have a First Amendment right to make rules that control ballot access in defiance of the will of state legislatures, then they also have that same right to make rules that control ballot access in defiance of the will of Congress. It is a power that, once established, is unlikely to be voluntarily reduced by those who enjoy its use. Having established it by unilateral

declaration and maintained it with the cooperation of a complaisant judiciary, they are unlikely to not be able to find occasion for its expansion. If private party inner cadres can add to state statutory schemes then they can do the same to those which Congress devises. The Times, Places and Manner Clause provided for the overriding regulation by Congress so that the states might not dissolve the national union. See Madison's comments during the constitutional debates cited in U.S. v Gradwell, 243 US 476, 484. The position of the rule proponents, both appellants and lower courts, inevitably leads to the position that the political parties, acting through their inner cadres at the national and local level, have a First Amendment right to power which the Framers would not grant to the state legislatures without the check and balance of the power of Congress to step in and

regulate by law when necessary. Thus seen in its totality, this is an untenable position. There is no authority to support it that has been cited. Both have indicated that it is up to the appellants to show authority to refute such a contention. There is none, because no one has made such a bold assertion before. The proper focus of this Court is on the departure in jurisprudence that this assertion of the right to make the rule, and the second right to add it to the state statutes, represent. The burden should be on the other side to show that such a private right and authority exist.[27] Any such attempt to show that such a right exists should properly have to show that the specific roadblock which

---

[27] "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." Lavine v Milne, 424 US 585, 586.

the Framers erected in Art.I, Sec.4, as definitively interpreted in Smiley, is not applicable here and why.[28]

THE RULE IS NOT A STATE STATUTE INTERPRETED BY A STATE COURT; IT IS CLAIMED PURSUANT TO A FEDERAL RIGHT AS FEDERAL LAW BINDING UPON FEDERAL ELECTIONS. THE REPRESENTATION THAT IT IS MERELY STATE LAW IS ERROR THAT IS TOO DANGEROUS TO BE ALLOWED TO STAND

A rule governing ballot access in a federal race, where its proponents claim it is pursuant to a federal constitutional claim, does not lose its character as federal because of a further claim that it can be added to existing state law and

---

[28] "The Founding Fathers considered parties divisive and baleful influences. Although they knew that 'factions,' as they called parties, might develop, they hoped that the constitutional arrangements would curtail party influences and make it difficult for them to operate." Edward S. Corwin, J.W. Peltason, Understanding the Constitution, 4th Ed., 1967, p. 49. John Jay, "Address to the People of New York, on the Subject of the Proposed Constitution," 1788, Elliot's Debates, Vol. 1, Journal of the Federal Convention, J.B. Lippincott & Co., Phila. 1896, p. 500. Madison, Letter to Edmund Randolph, 1788, ibid., Vol.V, p. 574. See

incorporated therein by extra-legislative means. Federal canons of statutory interpretation apply but were ignored. There are no independent state grounds. NAACP v Alabama, supra, at 455. There is no "fair or substantial support"for a non-federal ground. Ward v County Commissioners, 253 US 17, 22. The non-federal ground does not "independently and adequately support...the judgment." Abie State Bank v Bryan, 282 US 765, 773. An interpretation of Maine's homicide statute by its highest court has little to do with the case. As was said in Patterson v New York, 432 US 197, 201: "It goes without saying that preventing and dealing with crime is much more the business of States than it is of the Federal Government, Irvine v California, 347 US 128, 134 (1954)." The reliance below upon Mullaney v Wilbur, 421 US 684, 691 (1975), seems

inapposite inasmuch as note 11 on the page cited points out that the exception, even in the case of criminal statutes, is when there is an "obvious subterfuge to evade consideration of a federal issue." This seems to fit here, where an unspecified ambiguity was found without even referring to the statutory language itself in order to accomodate a never before heard of federal right. This appears to have been just to claim the protection of the phrase a "state's highest court interpreting a state statute." As to the error of this kind of interpretation which looks to extraneous factors without examining the language of the statutes: under Massachusetts law, see n. 2, above, p. 18. Under federal canons of statutory interpretation: Caminetti v US, 242 US 470; Bread Political Action Comm.v FEC, 455 US 577; Dawson Chemical Co. v Rohm &

Haas Co., 448 US 176, 187; Consumer Product Safety Comm. v GTE Sylvania, Inc., 447 US 102.[29]

THE SEVENTEENTH AMENDMENT

An election which has additional and more burdensome requirements than those prescribed by a legislature pursuant to Smiley is not "by the people" if the people's say is lessened by private imposition of the more burdensome requirements. Since here only the statewide candidates have to comply with

---

Federalist No. 10.

[29]As was said in CPSC, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." The only contrary "legislative intent" here comes from the rule's proponents, if indeed, they do have the power to privately make laws. There is no "concomitant exegesis of statutory authority." The Court below finds a "delegation" of authority without being able to point to a single statute that empowers it. This lacks "power to pursuade." Adamo Wrecking v U.S., 434 US 275,287, when dealing with law that is delegated federal law.

the rule, the Hopfmann electors had to have attended the convention to get a chance to cast a vote that made a difference. This same qualification was not imposed upon electors of the most numerous branch of the state legislature. If this jaybird convention rule is allowed to stand it will render the Seventeenth Amendment relatively meaningless.

CAPABLE OF REPETITION YET EVADING REVIEW

This case falls under the category of those that are "capable of repetition yet evading review." Williams v Rhodes, supra.

5TH CIRCUIT CASES SHOULD APPLY, NOT 1ST

Here there was a preconceived plan to conduct an unconstitutional election and timely requests for relief, such as ballot placement, were improperly refused by the district court which then took a lot of time for sometimes questionable reasons. Therefore it falls under the 5th Circuit line of cases Hamer v Campbell, Bell v

Southwell, and Brown v Post, supra, which have held that in such a situation it makes no difference that the party seeking the invalidation cannot show that the outcome would have been different but for the acts complained of and not under the case in the First Circuit which is split on that point. Grifin v Burns 579 F2d 1065. There is a split in the circuits compelling review because the 5th Circuite cases were developed in the monumental struggle in the South over the basic and fundamental rights of the franchise and are the only cases applicable to the reality of an assault upon the franchise as brutal as that demonstrated here.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AND REQUIRE FULL CONSIDERATION

Unless the case is heard the unanimous decision of this Court in Smiley v Holm, supra, will be overturned in the First Circuit without having been addressed.

Along with it there will be a serious erosion of the constitutional scheme for controlling party and "faction," the Times, Places and Manner Clause which Smiley interprets, and the Qualifications Clauses, which are interpreted by Powell.

If this case is not heard, a major shift in the federal system will occur with political parties free to challenge legislatures for control of laws governing ballot access. The control upon party and faction which the Framers created will have been eroded by a fait accompli.

A dangerous trend will have been established which converts the First Amendment freedom of association from a shield protecting all the members of an organization as a unified body, to a sword used by "factions" within organizations to accumulate power at the expense of their fellow members -- of the franchise or power of other sorts. What will be

established is a federal constitutional right to make internal "laws" overriding rights of individuals within organizations in a manner protected from meaningful judicial review.

The most radical part of the existing lower court opinions is the sanctioning of the power in political parties to actually make laws, in the form of private rules that are not subject to the constituent bargaining process of legislatures, and then to add those laws to state statutory schemes, even when they are not desired by the legislators. This power will only expand if not checked and will be as paramount over the wishes of Congress as it has so far been over the desires of the legislators of Massachusetts. Thus the federal system of checks and balances in the Constitution would be seriously compromised.

Respectfully Submitted,

Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628-1114

Lawrence J. Ball
Ten Tremont St.
Boston, Mass.02108

Frederick A. Goldstein
120 S. University Dr.
Plantation,Fla. 33324

James F. Schoener
1015 15th Street, N.W.
Washington, D.C. 20005

Counsel for Appellants

CERTIFICATE OF SERVICE UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by United States mail, first class, postage prepaid, this 23rd day of December, 1985, true and accurate copies of this Jurisdictional Statement upon Alexander Gray, Jr., Esq., Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record below for defendants-appellees Secretary of State Connolly and Attorney-General Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass., 02110, counsel of record below for defendants-appellees Chester G. Atkins and the Democratic State Committee of Massachusetts, 3 copies for each defendant.

_____